

No. 89-1622

Supreme Court, U.S.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

ODEH JOSEPH SALEH, PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court committed plain error in instructing the jury with respect to the principles of constructive possession.
2. Whether the evidence was sufficient to prove that petitioner constructively possessed a firearm.
3. Whether the evidence was sufficient to sustain petitioner's conviction for aiding and abetting an attempt to distribute cocaine.



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OPINION BELOW

The judgment order of the court of appeals (Pet. App. A1) is unpublished, but the decision is noted at 893 F.2d 1335 (Table).

JURISDICTION

The judgment of the court of appeals was entered on January 17, 1990. The petition for a writ of certiorari was filed on April 17, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted of conspiring to possess cocaine with the intent to distribute it, and conspiring to distribute cocaine, in violation of 21 U.S.C. 846; aiding and abetting the distribution of cocaine, in violation of 21 U.S.C. 841(a)(1); aiding and abetting an attempt to distribute cocaine, in violation of 21 U.S.C. 846; possessing a controlled substance with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1); possessing a firearm after having been convicted of a felony, in violation of 18 U.S.C. 922(g); and three counts of using a telephone to facilitate a drug felony offense, in violation of 21 U.S.C. 843(b). Petitioner was sentenced to concurrent terms of 97 months' imprisonment on each count, to run consecutively to a state sentence. He was also sentenced to a three-year term of supervised release on the conspiracy count.¹

The evidence presented at trial showed that from March 1986 until petitioner's arrest on December 4, 1987, petitioner and his brother Tony sold cocaine out of Joe's Neighborhood Market, their family-owned grocery store in Detroit, Michigan.

Joseph Slate, a long-time associate of the Salehs, testified that he had delivered cocaine for the Salehs to about 100 customers and had been compensated with cocaine and groceries from the Salehs' store. Gov't C.A. Br. 8. Another witness, Ted Sverekis, stated that he had bought cocaine from either petitioner or his brother on about 50 occasions. *Id.* at 9. In addition, Gary Raymond testified that he purchased cocaine regularly from both petitioner and Tony Saleh starting in the spring of 1986. *Id.* at 4-5.

¹ Petitioner was indicted with two co-conspirators, Ahmed Joseph "Tony" Saleh and Joseph Slate, both of whom pleaded guilty. Gov't C.A. Br. 3.

The evidence also showed that the Salehs kept a gun behind the counter of their store. Slate testified that he saw petitioner handle that weapon on more than one occasion. Gov't C.A. Br. 9. In addition, Raymond stated he saw petitioner display a gun at least twice and that petitioner used the gun for emphasis during a conversation. Moreover, Raymond testified that, while holding the gun, petitioner had threatened to kill Raymond's wife. *Id.* at 6.

After that incident, Raymond began cooperating with the Drug Enforcement Administration. Raymond introduced Agent Dominick Braccio to the Salehs, and Braccio then conducted a four-month investigation of the Salehs' cocaine organization. Gov't C.A. Br. 6-7. Braccio bought cocaine from the Salehs on six different occasions. *Id.* at 10.

Although Braccio dealt primarily with petitioner's brother Tony, petitioner was closely linked to Tony's drug transactions with Braccio. On November 6, 1987, Braccio told petitioner over the telephone that he wanted to alter the details of an upcoming cocaine deal that he and Tony had arranged. Petitioner agreed to relay that information to Tony. The cocaine was ultimately delivered on the terms that Braccio had discussed with petitioner. Gov't C.A. Br. 11. Later that month, Braccio called Tony several times in order to set up a large cocaine purchase. Tony was unwilling to commit to a plan until he conferred with his brother. *Ibid.* When Braccio finally contacted Tony at a time when he could consult with petitioner, Braccio asked Tony what the total price of the sale would be if two ounces of cocaine were added to the original order of one pound. Tony conferred with petitioner and then told Braccio that the price would be \$18,000. Tony also told Braccio to call petitioner the next day to arrange a time for the sale. When Braccio did so, petitioner set the meeting time and informed Braccio that Tony would bring "security" with him. *Id.* at 12.

The sale was scheduled for November 20, 1987, but it did not occur because Tony did not believe that the proposed location for the transfer was secure and Braccio was unwilling to alter the plans. The sale was rescheduled for December 4, 1987. On that day, Tony Saleh and Slate were arrested as they attempted to deliver 503 grams of cocaine to Braccio. Gov't C.A. Br. 13.

Immediately after those arrests, federal agents executed a search warrant at Joe's Neighborhood Market. Petitioner was the only owner present. When the agents entered, petitioner was standing behind the counter, under which was a loaded .45-caliber pistol. The agents found bullets and \$1,500 in cash in petitioner's pockets, including a \$50 bill with which the DEA had purchased cocaine from Tony. A quantity of cocaine was recovered from a storage cooler in the store. Gov't C.A. Br. 13. Petitioner was arrested, tried, and convicted, and the court of appeals affirmed without opinion. Pet. App. A1.

ARGUMENT

1. Petitioner raises three challenges (Pet. 5-9) to the district court's instructions on constructive possession. Petitioner's failure to raise any of those challenges in the court of appeals forecloses review by this Court. *United States v. Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n. 2 (1970). In any event, petitioner's claims have no merit.

a. Petitioner first contends (Pet. 6) that the district court should have instructed the jury that in order to establish constructive possession of the firearm found in the Salehs' store at the time of petitioner's arrest, the government must prove that the defendant had knowledge of the presence of the firearm and had the intent to exercise control over it. At trial, however, the district court issued the very instruction petitioner now requests. The court stated that:

A person who, although not in actual possession, knowingly has both the power and the intention at a given time to exercise dominion or control over the thing, either directly or through another person or persons, is then in constructive possession of it.

8 Tr. 178-179.² That instruction required the jury to find that petitioner knew of the presence of the weapon and intended to exercise control over it. Thus, petitioner's claim has no merit.

b. Petitioner also asserts (Pet. 6-7) that the district court should have instructed the jury that petitioner's lack of ownership of the firearm was relevant to the question whether he was in constructive possession of it. The court's failure to give such an instruction, petitioner contends, "effectively precluded" the jury from considering that evidence. But petitioner did not request any such instruction at trial. Moreover, the jury was free to consider that petitioner did not own the firearm, for whatever that evidence was worth. In fact, during closing argument defense counsel brought to the jury's attention that Tony Saleh owned the firearm. 8 Tr. 119-121. The court was not required to instruct the jury that the evidence of nonownership was relevant since a court is not required to instruct the jury as to the probative value of every piece of relevant evidence.³ Nor was petitioner prejudiced by the court's instruction that peti-

² See I E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* § 16.07 (3d ed. 1977).

³ The cases cited by petitioner — *United States v. McCoy*, 781 F.2d 168 (10th Cir. 1985); *United States v. Tribunella*, 749 F.2d 104 (2d Cir. 1984); and *United States v. Wilson*, 620 F. Supp. 104 (M.D. Tenn.), *aff'd*, 774 F.2d 1164 (6th Cir. 1985) (Table) — do not hold otherwise. Those cases stand for the unremarkable proposition that a defendant's ownership or lack of ownership of a firearm is generally relevant to whether he constructively possessed it at a particular time. The cases

tioner's constructive possession of the firearm could be established without proving that petitioner owned the firearm. 8 Tr. 177. Petitioner concedes (Pet. 6) the validity of that instruction.

c. Petitioner also contends (Pet. 8-9) that the district court erred by instructing the jury that the requirements of 18 U.S.C. 922(g) were satisfied by proof that petitioner "possessed the firearm for any length of time." 8 Tr. 176. Although petitioner did not object to that instruction at trial, he now claims that it authorized the jury to return a guilty verdict if petitioner possessed a firearm at times other than the date recorded in the indictment — December 4, 1987. The court, however, made clear to the jury that it could convict petitioner only if it found that "on or about December 4th, 1987, the [petitioner] received or possessed the firearm described in the indictment." 8 Tr. 175. The language referred to by petitioner simply served to inform the jury that the length of time on December 4, 1987, that petitioner may have possessed the firearm was immaterial to his guilt.

2. Petitioner next renews his contention (Pet. 9-13) that the evidence presented at trial was insufficient to prove that he constructively possessed the firearm found near him at the time of his arrest. Viewing the evidence in the light most favorable to the government, however, it is clear that petitioner knew of the presence of the firearm and intended to exercise control over it. Petitioner was a co-owner of the store in which the loaded firearm was found, and he had been seen handling a firearm on several occasions inside the store. Furthermore, when the DEA agents entered the store, the .45-caliber pistol was located just six inches from petitioner's knee. During a search of petitioner incident to

do not hold or suggest that a defendant charged with constructive possession of a firearm is entitled to an instruction about his lack of ownership of the firearm.

his arrest, the agents found bullets and a marked \$50 bill that had been passed to petitioner's brother during a drug sale. Petitioner's ownership of the store, his participation in the drug trade, the testimony that he had handled weapons in the store, his proximity to the firearm, and the presence of bullets in his pocket strongly suggest that petitioner knew of the presence of the weapon and intended, if necessary, to exercise control over it.⁴ In light of that evidence, a jury reasonably could have concluded that petitioner, a prior felon, was in constructive possession of the firearm. Thus, the district court properly denied petitioner's motion for a judgment of acquittal on the count charging him with a violation of 18 U.S.C. 922(g).

3. Finally, petitioner renews his claim (Pet. 13-16) that the evidence was insufficient to show that he aided and abetted the attempt to distribute more than 500 grams of cocaine on December 4, 1987.

Contrary to petitioner's claim, the evidence at trial showed that petitioner was an active member of a criminal conspiracy to sell drugs that continued until his arrest on December 4, 1987. Witnesses testified that petitioner characterized himself as the leader of the family cocaine distribution business, boasted of his 14 years of experience as a dealer, weighed and packaged cocaine for sale, and provided cocaine to co-conspirators for delivery. Gov't C.A. Br. 4-6.

The evidence also demonstrated that petitioner was intimately involved in the attempt to sell more than 500 grams of cocaine to Dominick Braccio, an undercover DEA agent, on December 4, 1987. Testimony presented at trial showed

⁴ Petitioner notes (Pet. 11) that he made no attempt to reach for the firearm at the time of his arrest. The arresting agent testified, however, that he put petitioner to the floor as soon as he entered the store in order to prevent petitioner from reaching for a weapon. C.A. App. 121.

that Tony Saleh was unwilling to set up the sale to Braccio without first conferring with petitioner. Once the terms of the sale were settled, Tony again consulted with petitioner to set the sale price at \$18,000 for 18 ounces of cocaine. Petitioner made final arrangements with Braccio for the sale to take place on November 20, 1987, and he warned Braccio that Tony would arrive with "security." Although the sale did not go forward on November 20 because of Tony's fear that the proposed site of the sale was not secure, it was rescheduled for December 4, 1987. Clearly, petitioner contributed to the planning and execution of the attempted cocaine sale on December 4. Contrary to petitioner's assertions (Pet. 13, 14, 16), the fact that the sale was postponed from November 20 to December 4 is immaterial. The evidence showed that petitioner's participation in the transaction originally scheduled for November 20 contributed to the attempted sale that ultimately was set for December 4. Thus, the evidence was sufficient to sustain petitioner's convictions for aiding and abetting an attempt to distribute cocaine.⁵

⁵ Petitioner suggests, but does not explicitly argue (Pet. 15-16), that his conspiracy conviction may have been based upon insufficient evidence of his involvement in the events of December 4. He states that his participation in the transaction planned for November 20 ended when that deal was abandoned. That claim does not merit review because it was not raised below and it is not raised expressly in the questions presented. In any event, the facts establishing that petitioner aided and abetted the attempted distribution of cocaine on December 4 also demonstrate that petitioner was an active co-conspirator with regard to that crime.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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